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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of JOLENE and STEVEN MOLL.	
JOLENE MOLL, Respondent, v. STEVEN MOLL, Appellant.	E069093 (Super.Ct.No. HED1300016) OPINION

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Patrick J. McCrary for Appellant.

No appearance for Respondent.

Steven James Moll (Steven)[1] appeals from a judgment of the family court entered after a trial on reserved issues. Steven argues the trial court erred by awarding his ex-wife Jolene Michele Moll (Jolene) $10,000 in attorney fees as sanctions, pursuant to Family Code section 271 (all undesignated statutory references are to the Family Code). According to Steven, he did not receive adequate notice that he might be ordered to pay attorney fees as sanctions, and he was not provided with an opportunity to be heard. In addition, Steven contends the family court abused its discretion by imputing income to him based on his prior employment as a manager of a tire store. He argues the evidence established he was no longer physically capable of performing that job and that, in order to earn the level of income needed to pay child support based on the imputed income, he would have to work longer hours than he wished and spend less time with his children from the marriage, which would not be in the best interests of the children.

With respect to the award of attorney fees to Jolene, Steven never objected in the family court that he did not receive proper notice that he might be ordered to pay fees; he presented no argument in the family court that an award of attorney fees was unjustified or object that he had not been provided with the opportunity to be heard on the issue; and he did not object to the family court's tentative decision or move for reconsideration or a new trial on the issue of fees. We must conclude Steven did not properly preserve his claims of error regarding the award of attorney fees. Finally, we conclude the family

[1] As is customary in family law appeals where the spouses have the same surname, we will refer to the parties by their first names to avoid confusion. We mean no disrespect. (See *In re Marriage of Macilwaine* (2018) 26 Cal.App.5th 514, 518, fn. 2.)

court did not abuse its discretion by imputing income to Steven. Therefore, we affirm the judgment.

I.

FACTS[2]

Jolene and Steven married on May 21, 2005, and they separated approximately seven years seven months later. The marriage resulted in three children. On August 19, 2013, the family court granted Jolene's motion to bifurcate the question of marital status and entered a status-only judgment dissolving the marriage.

A. Jolene's Evidence.

After the marital separation, Jolene lived with the children in San Jacinto. Steven had moved to Escondido to live with his future wife and, subsequently, they moved to Lakeside to live on property owned by Steven's in-laws. A child custody evaluator had told Steven and Jolene that he would recommend a 50/50 child custody arrangement if Jolene would move from San Jacinto to Temecula and Steven would move from Lakeside back to Escondido. Jolene moved to Temecula to be closer to Steven. After the move, Jolene worked approximately three and a half miles from her home, and the children's

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[2] Steven does not challenge the child custody orders in the judgment. We need not and do not discuss the facts related to that issue, except to the limited extent those facts are relevant to the child support order that *is* challenged on appeal.

Moreover, because Steven does not challenge the sufficiency of the evidence to support the family court's factual findings related to the award of child custody, we must presume they are, in fact, supported by substantial evidence. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 808 ["trial court's unchallenged findings are presumed to be correct"]; *PR/JSM Rivara LLC v. Community Redevelopment Agency* (2009) 180 Cal.App.4th 1475, 1486 ["Given that the opening brief does not challenge this factual finding, it is presumed correct on appeal."].)

schools were between one to two miles from the home. Rather than move to Escondido, Steven remained in Lakeside, which is approximately 60 miles from Temecula.

Jolene asked that the court order Steven to pay child support according to the uniform state guideline based on her current income and Steven's earning capacity, as opposed to his reported income. At the time of trial, Steven worked 30 hours a week for a trucking business in Lakeside owned by his new father-in-law. In an income and expense declaration—which he submitted as an exhibit at trial but did not file with the court—Steven stated he earned approximately $2,600 gross a month. Steven testified he was "training for sales" and learning the business, but that he was not yet actually working in sales.

While testifying during Jolene's case-in-chief, Steven testified he wanted the court to find that his gross monthly income was $2,600 because of an unspecified "disability." Previously, Steven had worked for his father's tire business and earned approximately $6,000 a month or $70,000 a year. For three and a half to four years, Steven worked as a tire store manager in Hemet and "r[a]n the entire operation." All things being equal, Steven would have expected a raise if he had remained in his father's employ. Steven denied that he lost that job because he had asked his father to pay him under the table while the divorce case was ongoing, and he testified he and his father had a "falling out" over his father's decision to hire a friend to be a store manager.

Steven testified he did not attempt to find a job as a tire store manager for another company. He said, "the hours that are required for a tire store manager" meant he "was not getting enough time to spend with [his] children." While he was still working for his

father, Steven worked 12- or 13-hour days. When asked if he could once again work as a tire store manager, Steven replied, "I doubt it." Steven testified that he had been out of the tire business for "many years" and no longer had knowledge "of any of the tires that are out nowadays." He also repeated that he no longer wanted to work six days a week for 12 hours a day. When asked by Jolene's attorney if there was any other reason why he could not go back to working as a tire store manager, Steven again reiterated that the reason was "not being able to spend time with my children." He did not say that he was unable to perform the job of a tire store manager because of a "disability" or other physical impediment.

Steven Moll (Mr. Moll), Steven's father, was president of a company that ran three tire stores. Steven worked for the company for about eight years and was manager of the Hemet store when he left the company. Mr. Moll testified tire store managers earned between $60,000 and $70,000 a year plus $800 a month for medical insurance. At the time he left the company, Steven was earning approximately $70,000 a year including benefits. Mr. Moll testified Steven had asked that he be paid "under the table" so his child support would be reduced. Mr. Moll refused and, within a month, Steven left the company. Mr. Moll testified that Steven's departure from the company had nothing to do with Mr. Moll "trying to replace his position" with someone else.

At the time of the trial, Mr. Moll had been in the tire business for more than 16 years. Mr. Moll testified he was familiar with the prevailing wages for tire store managers in the San Diego and Riverside areas. He "stay[ed] up" on wage information to remain competitive in the market. Mr. Moll testified that someone with Steven's

experience could expect to earn between $70,000 to $90,000 in salary and benefits as a tire store manager in the Hemet and San Diego areas. He also testified that he "stay[ed] aware" of job opportunities in the San Diego and Inland Empire areas for tire store manager positions because "[w]e're always looking for good people." Mr. Moll testified job opportunities for tire store managers at the salary rates he had discussed were available in San Diego and the Inland Empire.

On cross-examination, Mr. Moll admitted that he had no documentary proof or corroborating witness to support his testimony that Steven had asked to be paid under the table. Mr. Moll denied that it was *he* who offered to pay Steven under the table as an incentive so Steven would not leave the company.

B. Steven's Evidence.

Whereas Steven testified he worked 12- to 13-hour days when he had worked for his father, he had flexible hours in his current job, he started work between 8:30 and 9:00 a.m., and he usually got off no later than 2:30 p.m. or 3:00 p.m.

Steven testified about a recent incident when he was required to use physical force to restrain his 12-year-old son. When asked by his attorney if he had any "medical issues" that might limit his ability to restrain his son in the future, Steven testified he had undergone six knee surgeries and had a heart monitor implanted in his chest because a year earlier he had "trouble passing out" when his blood pressure plummeted. Steven testified that "there's not a lot of cartilage left" in his knees, that he suffered "a lot of damage" from arthritis, and that if he "barely twist[s]" his knees they "instantly swell up and instantly start causing pain and limit my activities."

When asked about his father's testimony that Steven might be able to perform his old job as a tire store manager, Steven testified he could no longer do the job. Steven again testified that he had six knee surgeries—three in the last three years—and that he could no longer stand on his feet for the eight to 10 hours a day the job required. Steven testified the job of a tire store manager entailed "[d]oing sales, getting tires for the general service guys off shelves, getting parts for the guys. Sometimes helping put tires on and off the vehicles to get the cars moving in and out a little quicker." In contrast, Steven testified his current job only required him to stand for half an hour a day, and it did not require him to perform tasks requiring knee exertion, such as retrieving tires. However, Steven admitted he had been given no restrictions on the type of work he could perform from a medical professional. Steven was aware of tire store manager opportunities at the time, but he testified he was not qualified for those positions because of his health, because he had been out of that line of work and was no longer knowledgeable of the industry, and because he was no longer capable of retrieving tires for customers. Steven testified that his inability to retrieve tires would hinder his ability to be hired as a tire store manager.

On cross-examination, Steven again denied that he had asked his father to be paid under the table. When asked why he believed his father had testified as he did, Steven said it was because they had had a falling out when his father hired a friend from a competing company and made him a store manager. Steven testified he was not underemployed, and that he was doing everything he could. He said he could not go back to working as a tire store manager because of his knee surgeries and his chest implant.

Steven testified his most recent knee surgery was almost two years earlier. He was not issued a work restriction from his physician, but he did fully participate in physical therapy after his surgery and attended follow-up appointments. Steven testified he received no additional treatment thereafter. He used a knee brace for bending or stooping, but the last time he had worn it was two weeks prior.

When asked on cross-examination if he or a doctor made the determination that he could no longer perform the job of a tire store manager, Steve testified, "I made that determination." He said he had known he could no longer do that job for the last year to year and a half. With respect to his testimony that he was no longer knowledgeable about the tire industry, Steven said, "I lack all the knowledge of the tires. I mean, I couldn't tell you any of the tires that are out right now." He testified it would probably take him three months to get up to speed on the current information in the tire industry. Steven testified his father understands very well what a tire store manager does, and his father "technically" offered him a job despite his knee problems.

C. Arguments of Counsel.

During closing argument, Jolene's attorney argued the court's award of child support should be based on Steven's earning capacity. "I think we demonstrated an ability to earn, and there are meaningful jobs out there he could apply to. I don't think that was sufficiently refuted, despite the . . . testimony regarding his medical issues and so forth. The fact of the matter remains there is nothing in his way to go back to work. By all accounts, the surgeries were over two years ago. He does have some problems being away from that workplace[, i.e., the tire industry], but those should be shored up,

we believe, rather rapidly." Relying on Mr. Moll's testimony, counsel argued Steven was capable of earning approximately $7,000 a month.

In his closing argument, Steven's attorney argued the court could only impute income if it found Steven had the ability, willingness, and opportunity to work as a tire store manager. Counsel argued the evidence to support such findings was "very, very thin." With respect to the opportunity to work, counsel stated, "We don't have the name of a shop where he could work right now." As to Steven's ability to perform the job of a tire store manager, counsel argued the evidence demonstrated Steven was not physically capable of performing the job—which entailed retrieving tires from stacks, squatting to change tires, and standing on his feet for eight to 10 hours a day—because of his numerous knee surgeries.

To counter the argument that no doctor had said Steven could not perform the job of a tire store manager, counsel stated, "no doctor . . . says he couldn't be an Olympic high jumper, either. You can take that line of logic and take that argument to the most ludicrous extreme, and you can still use it just the same." In addition, counsel argued the evidence showed that, in the three years Steven had been out of the tire business, tires had changed. "He's not going to walk in anywhere as, hey, I'm manager at a time [when] he doesn't even know what the names and sizes and metrics of tires are anymore. That is what his testimony is. To say that he can walk in as a manager three years out of the business is unsupported by the evidence." Finally, counsel argued Mr. Moll, who had a falling out with his son, was not a credible witness with respect to Steven's ability and opportunity to work as a tire store manager.

In rebuttal, Jolene's attorney argued Steven had "found himself a cozy niche where he can work as he chooses." Counsel pointed out that the only opinion the family court had heard about Steven's ability and opportunity to work had come from Mr. Moll. "[Steven] has not . . . had any doctor's restrictions, medical restrictions being issued by his physician, or anything along those lines." Counsel argued the evidence established Steven had the capacity to earn $7,000 a month.

D. The Family Court's Ruling.

In its amended tentative decision and ruling on submitted matter, the family court found, inter alia, that Steven voluntarily left his job with his father's tire company "because of his father's refusal to pay him 'under the table' so he would not have to pay child support to [Jolene]." The court expressly found that Mr. Moll was "an extremely credible witness," and that the evidence presented at trial established Steven "could well have secured other employment with other tire companies" and earned over $70,000 a year. Therefore, the court imputed Steven's earnings as $60,000 a year for purposes of the award of child support to Jolene.

The court also found that the child custody evaluator agreed to a proposed "compromise" of both parents moving closer to each other, which would have resulted in Jolene and Steven sharing child custody 50/50. The court found that Jolene agreed to the compromise and moved to Temecula from San Jacinto. The court found that Steven said he would move to Escondido, but that he never intended to follow through. Instead, Steven tried to alienate the children from Jolene so he could obtain full custody and avoid paying child support.

As explained more fully, *post*, the court also found that Steven engaged in a pattern of misrepresenting facts and figures and misleading the family court, including filing false income and expense declarations. Based on that conduct, the court ordered Steven to pay Jolene $10,000 in attorney fees as a sanction under section 271.

Neither party timely objected to the tentative decision, so it became the court's final statement of decision. The family court thereafter entered judgment.

Steven timely appealed.

II.

DISCUSSION

A. Steven Forfeited His Claims of Error Regarding the Award of Attorney Fees.

Steven contends the family court's award of attorney fees under section 271 must be reversed because he was not provided with adequate notice that he might be subject to such an award, and he was not provided a fair opportunity to rebut the factual basis for the award.[3] We do not reach the merits of Steven's claims because, by not addressing any of his claims of error in the family court, he has forfeited those claims and did not properly preserve them for review on appeal.

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[3] Jolene did not file a respondent's brief. Therefore, we "may decide the appeal on the record, the opening brief, and any oral argument by the appellant." (Cal. Rules of Court, rule 8.220(a)(2).) "Nonetheless, [Steven] still bears the 'affirmative burden to show error whether or not the respondent's brief has been filed,' and we 'examine the record and reverse only if prejudicial error is found.'" (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1078.)

1. Additional Facts.

Jolene did not request attorney fees in her petition, and Steven did not request fees in his response. In her trial briefs, Jolene requested that the family court order the parties to bear their own costs and attorney fees. Steven's initial trial brief was silent on the issue of fees. However, in a supplemental trial brief, Steven requested the court direct Jolene to make a reasonable contribution toward his fees. At the beginning of the trial, Jolene reiterated that she was requesting the parties bear their own attorney fees and costs. As the trial proceeded, however, Jolene testified she was now requesting that Steven be ordered to make a reasonable contribution to the more than $10,000 in attorney fees she had incurred.

Neither party made an opening statement at trial. During closing argument, Jolene's attorney argued he had attempted to "present a case in such a fashion as to get it done without undue hardship, without undue emotional toil on everybody. But at some point when you hold the olive branch out and the other side takes it away from you and slaps you around, after about the tenth time or so, you got to get in the fight." Counsel accused Steven of manipulating the children and going to great lengths to avoid paying child support. "He wishes to gain custody of the children in such a way he does not have to pay child support. I think he's demonstrated that by under reporting himself, by offering false pay stubs, by attempting to deceive the Court with soliciting his own father for under-the-table payments, as you heard, all to show the Court he is making a lot less

income, while all the time my client is doing her *Gavron*[4] duty to essentially increase her income, which she has done every year." When addressing the issue of attorney fees, Jolene's attorney stated, "We did submit to the Court a request, proper request, pursuant to [section] 271. That was filed. That was served over a month ago." Counsel requested the court award Jolene a "contribution" of $15,000 in attorney fees pursuant to sections 270 and 271.

The record before this court contains no written notice from Jolene requesting attorney fees pursuant to section 271. During his closing argument, however, Steven's attorney did not object that Jolene had not, in fact, filed and served a "proper request" for attorney fees. He did not object that Steven had not received timely *and* sufficient notice that Jolene would request attorney fees at trial. Steven's attorney did not request that the family court reopen evidence so he could present testimony or documentary evidence to contradict Jolene's claim that Steven had deceived the court and manipulated the children to obtain custody and avoid paying child support. In fact, Steven's attorney did not address the issue of attorney fees at all. Instead, Steven's closing argument focused entirely on the issues of child custody, child support, and imputed income.

In its amended tentative decision and ruling on a submitted matter, the family court stated attorney fees under section 271 had been at issue in the trial. Inter alia, the court expressly found: (1) Steven had filed false income and expense declarations in an

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4 See *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705. "[W]hat has become known as a '*Gavron* warning' is a fair warning to the supported spouse he or she is expected to become self-supporting." (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 55.)

attempt "to mislead [Jolene] and the Court"; (2) Steven willfully evaded paying child support; and (3) Steven "carried on a pattern of misrepresenting the facts and figures concerning the issues of custody, visitation and support." Based on those findings, the family court awarded Jolene $10,000 in attorney fees pursuant to section 271.

Steven did not object on any ground to the award of attorney fees or to the family court's findings of facts in the tentative decision, nor did he move for reconsideration or for a new trial on the issue of fees. Instead, he waited until his opening brief on appeal to address his claims of error regarding the award of attorney fees.

2. Applicable Law.

Section 271 provides "the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and the attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction." (§ 271, subd. (a).) The court shall not make an award of fees under section 271 if it "imposes an unreasonable financial burden on the party against whom the sanction is imposed." (*Ibid.*) Whereas the party requesting attorney fees from the family court usually must demonstrate need (see § 2030), the party requesting fees under section 271 "is not required to demonstrate any financial need for the award." (§ 271, subd. (a).)

"It has been said that section 271 and its predecessor imposes a 'minimum level of professionalism and cooperation,' to effect the policy favoring settlement of family law litigation—and a reduction of the attendant costs. [Citations.] Section 271 '"authorizes

sanctions to advance the policy of promoting settlement of litigation and encouraging cooperation of the litigants" and "does not require any actual injury." [Citation.] Litigants who flout that policy by engaging in conduct that increases litigation costs are subject to imposition of attorney fees and costs as a section 271 sanction.' [Citation.] Some courts have said the section authorizes attorney fees and costs as a penalty for obstreperous conduct. [Citations.]" (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1524.)

As a matter of statute and constitutional due process, the party to be sanctioned under section 271 must receive notice and an opportunity to be heard before the court makes an award. (§ 271, subd. (b); *In re Marriage of Duris & Urbany* (2011) 193 Cal.App.4th 510, 513.) "Section 271 does not specify the form of notice to be provided." (*In re E.M.* (2014) 228 Cal.App.4th 828, 850.) "[T]he notice provided must specify the authority relied upon and must advise of the specific grounds and conduct on which sanctions are to be based." (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178, citing *In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417, 1421-1422.) "The adequacy of notice, even when a trial court indicates an intent to impose sanctions on its own motion, should not depend upon an arbitrary number of days' notice but 'should be determined on a case-by-case basis to satisfy the basic due process requirements. The acts or circumstances giving rise to the imposition of expenses must be considered together with the potential dollar amount.'" (*In re Marriage of Quinlan*, at p. 1422.)

The family court must also provide a "forum to present opposition evidence" before it imposes sanctions pursuant to section 271. (*In re Marriage of Duris & Urbany*,

supra, 193 Cal.App.4th at p. 514.) However, "[s]ection 271 does not specify the nature of the hearing it contemplates. . . . [T]he opportunity to be heard does not necessarily compel an oral hearing. [Citations.] 'California courts have concluded that use of the terms "heard" or "hearing" does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent.' [Citation.] Furthermore, even if a hearing is required, 'due process does not necessarily require that a motion for sanctions for alleged misconduct during a hearing be heard on a separate and later hearing date.' [Citations.] '[T]he scope of a hearing on an application for sanctions is within the trial court's discretion, as with motions generally.'" (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178-179.) "A family law court is empowered to hear motions [for attorney fees and sanctions] based on declarations and to exclude oral testimony. [Citations.] Although the trial court has discretion to allow oral testimony in appropriate cases, it is not required to do so. [Citation.]" (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 982.)

"Sanctions under section 271 are committed to the discretion of the trial court, and will be reversed on appeal only on a showing of abuse of that discretion, that is 'only if, considering all of the evidence viewed more favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.'" (*In re Marriage of Davenport*, *supra*, 194 Cal.App.4th at p. 1524.) "'In reviewing such an award, we must indulge all reasonable inferences to uphold the court's order.'" (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478.)

3. Analysis.

Steven argues his right to due process was violated because he did not receive timely and adequate notice that the family court might award attorney fees to Jolene as a sanction. In addition, Steven argues he was denied a meaningful opportunity to be heard on the issue of sanctions and to present evidence because the question of sanctions was not addressed until the end of trial, after closing arguments had already been made. But Steven did not preserve these claims of error by timely objecting and raising them in the family court. Applying settled law, we conclude Steven forfeited his arguments regarding the award of attorney fees.

"'"'"An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.'" [Citation.] "'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.] "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the

right before a tribunal having jurisdiction to determine it.'"'"'" (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1558; accord, *In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1130-1131 ["'Appellate courts will not consider objections that were not presented to the trial court.'"].)

The courts have routinely found that a party forfeits a claim of error regarding an award of fees under section 271 by not timely objecting or addressing the alleged error to the family court in the first instance. (*In re Marriage of Falcone & Fyke*, *supra*, 203 Cal.App.4th at pp. 983-984 [by not objecting at the beginning of trial, wife forfeited claim that all-purpose family court judge, and not civil court judge, should have heard issues of attorney fees and sanctions]; *In re Marriage of Davenport*, *supra*, 194 Cal.App.4th at p. 1528 [by not raising issue in family court, wife forfeited claim that husband's request for sanctions had to be made on Judicial Council form]; *In re Marriage of Feldman*, *supra*, 153 Cal.App.4th at pp. 1495-1496 [husband forfeited argument that award of attorney fees was not "reasonable and necessary" by not objecting in family court to the amount of fees requested by wife]; *In re Marriage of Petropoulos*, *supra*, 91 Cal.App.4th at pp. 178-179 [wife forfeited claim that the family court denied her an opportunity to be heard on sanctions by not conducting a separate hearing because: (1) wife did not request a separate hearing; (2) she acquiesced in the family court's briefing schedule for written submissions on the issue of sanctions; and (3) she did not move for reconsideration or for a new trial on the issue of sanctions].)

If Steven believed an award of attorney fees to Jolene was improper because he had not been provided with adequate notice that he might be subject to such a sanction,

and if he believed the court should not have awarded fees until after he had been provided with an adequate opportunity to address the factual basis for such an award, he could have and should have interposed a timely objection at some point in the proceedings below. Because he did not do so, Steven has forfeited his claims of error.

B. The Family Court Did Not Abuse Its Discretion by Imputing Income to Steven for Purposes of Child Support.

Steven contends the trial court abused its discretion by imputing income to him instead of basing the award of child support on his then-current actual income. According to Steven, the evidence supported his claim at trial that he was not physically capable of performing the job of a tire store manager. Moreover, Steven contends the child support award will require him to undertake an extraordinary or excessive work regimen, which will further reduce the amount of time he could spend with his children, which would not be in the children's best interests. Substantial evidence supports the family court's express and implied findings of fact and determinations of credibility, and we conclude the trial court did not abuse its discretion by imputing income to Steven.

1. Applicable Law.

The Legislature adopted the mandatory state uniform guideline to comply with federal regulations governing child support, and a court may depart from the guideline only in "special circumstances." (§§ 4050, 4052; see §§ 4053, subd. (k), 4056, subd. (a).) Inter alia, the "principles" which must guide the calculation of child support include: "(a) A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life. [¶] (b) Both parents are

mutually responsible for the support of their children. [¶] (c) The guidelines take into account each parent's actual income and level of responsibility for the children. [¶] (d) Each parent should pay for the support of the children according to his or her ability. [¶] (e) The guideline seeks to place the interests of the children as the state's top priority." (§ 4053, subds. (a)-(e).)

Relevant here, the mathematical formula for calculating monthly child support under the guideline (CS = K[HN - (H%)(TN)])[5] includes the variables HN, which is the "high earner's net monthly disposable income," and TN, which is the "total net monthly disposable income of both parents." (§ 4055, subd. (b)(1)(C), (E).) "[N]et disposable income" is determined by taking a parent's "annual gross income," deducting specified amounts from that number, and dividing the resulting sum by 12. (§§ 4059-4060; see § 4055, subd. (b)(2).) "[A]nnual gross income" means "income from whatever source derived," and includes, among other things, a parent's salary, wages, commissions, and bonuses earned through their employment. (§ 4058, subd. (a)(1).) However, "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (*Id.*, subd. (b).)

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[5] Section 4055, subdivisions (a) and (b) state: "(a) The statewide uniform guideline for determining child support orders is as follows: CS = K[HN - (H%)(TN)]. [¶] (b) [¶] (1) The components of the formula are as follows: [¶] (A) CS = child support amount. [¶] (B) K = amount of both parents' income to be allocated for child support as set forth in paragraph (3). [¶] (C) HN = high earner's net monthly disposable income. [¶] (D) H% = approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent. In cases in which parents have different time-sharing arrangements for different children, H% equals the average of the approximate percentages of time the high earner parent spends with each child. [¶] (E) TN = total net monthly disposable income of both parties."

"""[F]or purposes of determining [child] support, 'earning capacity' represents the income the [parent] is *reasonably capable of earning . . . .*""" (*In re Marriage of Lim & Carrasco* (2013) 214 Cal.App.4th 768, 775, italics added.) """Earning capacity is composed of . . . the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications . . . and . . . an opportunity to work . . . ." [Citation.]' 'The opportunity to work' exists when there is substantial evidence of a reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income."""[6] (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1246, italics omitted.)

"'A trial court's decision to impute income to a parent for child support purposes based on the parent's earning capacity is reviewed under the abuse of discretion standard. [Citations.] "Under this standard, '[t]he appellate court should not substitute its own judgment for that of the trial court; it should determine only if any judge reasonably could have made such an order. [Citations.]'""" (*In re Marriage of Graham* (2003) 109 Cal.App.4th 1321, 1326.)

"'We observe, however, that the trial court has "a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . ."

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[6] In his brief, Steven cites *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, which included a third component, to wit, "the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment." (*Id*. at p. 1372.) "'Later courts, recognizing . . . the . . . willingness to work [element] should be taken for granted, recast *Regnery*'s three-prong test as a simple two-prong test: ability and opportunity.'" (*In re Marriage of McHugh*, *supra*, 231 Cal.App.4th at p. 1246, fn. 4, quoting *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1302.)

[Citation.] Furthermore, "in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]" [Citation.]' [Citation.] [¶] . . . '"[T]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious."'" (*In re Marriage of Lim & Carrasco*, *supra*, 214 Cal.App.4th at pp. 773-774.)

2. Analysis.

Steven contends he presented sufficient evidence to support a finding that he was no longer capable of working as a tire store manager because of his six knee surgeries (he does not argue that his past bout of low blood pressure and the need for a heart monitor precludes him from working that job). Steven argues the job of a tire store manager, which required him to work six days a week for 10 to 12 hours a day, is "excessive work which his body [can] no longer handle." Steven concedes he presented no medical records or testimony to support his claim, but he argues the family court should have credited his testimony because "he does know what is happening with his body and when he feels pain and the resultant physical limitations it imposes on him."

Steven is correct that, in general, earning capacity for purposes of determining spousal and child support should not be based on a spouse's "extraordinary" work regimen during the marriage, which required "excessive hours or an onerous work

schedule." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.) Instead, our Supreme Court held that earning capacity should generally be based on "an objectively reasonable work regimen as it would exist at the time the determination of support is made. [Citation.]" (*Id*. at p. 235.) "Such a conclusion is compelled by equitable considerations and is consistent with the legislative policies enunciated in the statutes governing family support. Setting support at a level which contemplates a work regimen considered extraordinary under current societal standards is contrary to [the] guideline authorizing spousal support that is 'just and reasonable' [citation] and [the] guideline authorizing child support 'according to the parent's circumstances and station in life. . . .'" (*Id*. at p. 235 [discussing Civ. Code, former §§ 4801, 4720, current Fam. Code, §§ 4053, 4330].)

"A reasonable work regimen, as opposed to an extraordinary regimen, however, is not readily or precisely determined and is dependent upon all relevant circumstances, including the choice of jobs available within a particular occupation, working hours, and working conditions. Established employment norms, such as the standard 40-hour work week, are not controlling but are pertinent to this determination. In certain occupations a normal work week necessarily will require in excess of 40 hours or occasional overtime and thus perhaps an amount of time and effort which may be considered reasonable under the circumstances. A regimen requiring excessive hours or continuous, substantial overtime, however, generally should be considered extraordinary." (*In re Marriage of Simpson*, *supra*, 4 Cal.4th at pp. 235-236.)

Steven's challenge to the family court's express and implicit findings of fact are reviewed for substantial evidence. (*In re Marriage of Lim & Carrasco*, *supra*,

214 Cal.App.4th at p. 774.) "When conducting a substantial evidence review, we must review the entire record in the light most favorable to the prevailing party, resolve all conflicts in the evidence in favor of the ruling or judgment being reviewed, and indulge all reasonable inferences in support of the family court's findings. (*In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1051 . . . .) *The family court's resolution of conflicts in the evidence and credibility assessments are binding on this court*. (*Id*. at pp. 1051-1052.)" (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1286-1287, italics added.) Likewise, we do not reweigh or revisit the family court's *implicit* determinations of credibility. (*Espinoza v. Shiomoto* (2017) 10 Cal.App.5th 85, 117; *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1319.)

As stated, *ante*, the family court found that Steven did not quit his job with his father because they had a "falling out" or, by implication, because he was no longer physically capable of performing the job. Instead, the court found that Steven asked his father to pay him "under the table" so he could avoid paying child support and, when his father refused, Steven voluntarily quit. The family court expressly stated that it found Mr. Moll to be "an extremely credible witness." Although the court did not explicitly say so, the court implicitly found that Steven was *not a credible witness* regarding the circumstances of his departure from his job as a tire store manager, his ability to once again find work in that field or, quite frankly, about anything. In its statement of decision, the court found that Steven was dishonest throughout the divorce proceedings and filed false income and expense declarations to avoid paying child support—findings that Steven does not challenge on appeal. It is, therefore, fair to say the family court

implicitly rejected Steven's testimony that he was no longer physically capable of performing the job of a tire store manager and that, by implication, his old job was "excessive" under the circumstances. We are not free to reweigh that judgment call.

Last, Steven is correct that determining a parent's earning capacity based upon his or her extraordinary work regimen during the marriage may, in some circumstances, contravene the statutory limitation that earning capacity be imputed for purposes of child support only if it is consistent with the best interests of the children. (§ 4058, subd. (b).) "[I]t is in the best interests of the children to receive nurturing from both parents. Indeed, sometimes 'the "best interests of the children" are *promoted* when parents [reduce their work hours] so as to be able to spend more time with their children.'" (*In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1390.)

True, Steven testified he no longer wanted to work long hours so he could spend more time with the children. Also true, he testified his current job had flexible hours, which permitted him to pick up the children from school and spend more time with them in afterschool activities. But, he ignores crucial findings of fact. The court expressly found that Steven agreed with the child custody evaluator's recommendation that both parties move closer to each other, so they could share custody 50/50. Jolene cooperated by moving from San Jacinto to Temecula. Although Steven said he would move from Lakeside to Escondido, he remained in Lakeside (which is 60 miles from Temecula), and the family court found Steven did all he could to drive the children away from Jolene so he could obtain physical custody and avoid paying child support. Those findings of fact, which Steven does not challenge on appeal and are presumed correct (see, *ante*, fn. 2),

are inconsistent with his implicit claim that he chose his current job because he wished to maximize the time he spent with the children.

On this record, we cannot conclude the family court abused its discretion.

III.

DISPOSITION

The judgment is affirmed. No costs are awarded.[7] (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.

[7] Although the prevailing party is typically entitled to costs on appeal (see Cal. Rules of Court, rule 8.278(a)(1)), Jolene prevailed here despite not filing a brief. (See, *ante*, fn. 3.) We decline to award costs to Jolene in such a circumstance.